

DEC 30 2003

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Attorneys for Creditors
Virgil Vial, Mark Vial, Mike Vial, d/b/a Au Mining, and
David Vial

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF IDAHO
(Moscow)

In Re:)	
)	Case No. 03-21652
GERALD LINDSEY and ONA LINDSEY,)	
)	Chapter 13
)	
Debtors.)	OBJECTION TO CHAPTER 13 PLAN
)	AND JOINDER OF TRUSTEE'S
)	MOTION TO CONVERT CASE

Virgil Vial, Mark Vial, Mike Vial, d/b/a Au Mining (collectively referred to herein as "Virgil Vial") and David Vial by and through their attorneys of record, Hawley Troxell Ennis & Hawley LLP, hereby objects to the Chapter 13 Plan filed by the Debtors Gerald and Ona Lindsey (collectively referred to herein as "Debtors"), pursuant to 11 U.S.C. § 1325 and hereby joins the Trustee's Motion to Convert this case to a Chapter 7 liquidation based upon 11 U.S.C. § 109(c)

OBJECTION TO CHAPTER 13 PLAN AND JOINDER OF TRUSTEE'S
MOTION TO CONVERT CASE - 1

and the Debtors' bad faith filing, pursuant to 11 U.S.C. § 1307(c). Virgil Vial and David Vial file this objection and joinder on the following grounds, which is also supported by the Affidavit of Sheila R. Schwager, attaching the Affidavit of Gregory Fitzmaurice and John Kluksdal filed concurrently herewith:

BACKGROUND

1. On August 31, 2002, Virgil Vial recovered a Judgment on Default in the Superior Court for the State of Alaska, Third Judicial District ("Virgil Vial Judgment"), against one of the Debtor's Gerald Lindsey ("Lindsey"). A copy of the Judgment is attached to Virgil Vial's Proof of Claim filed on December 2, 2003 (the "Virgil Proof of Claim"). The Judgment arose out of an agreement in which Lindsey and his partner Noel Tanner agreed to pay \$200,000 for certain leasehold rights in Candle, Alaska and gold mining equipment, including but not limited to two Caterpillar dozers, a loader, a backhoe, a dump truck, generators, and washing plants. Affidavit of Sheila R. Schwager, Ex. 1, filed concurrently herewith (the "Schwager Aff."). Pursuant to the terms of the agreement, Lindsey made a payment by turning over approximately 10,000 one ounce silver coins held by Lindsey at his residence.

2. The Virgil Vial Judgment was properly filed with the District Court of the Second Judicial District of the State of Idaho, pursuant to the provisions of Chapter 13, Title 10 of the Idaho Code and recorded in Idaho County on October 17, 2002. *See* Virgil Proof of Claim. On November 8, 2002, a Writ of Execution was issued to the Sheriff of Idaho County. Although Lindsey has argued in briefing in state court that he does not owe the debt set forth in the Virgil Vial Judgment, any and all periods of time to attempt to avoid the Virgil Vial Judgment have expired long ago. *See* Idaho Appellate Rule 14; Idaho Rule of Civil Procedure 60(b). Of course,

if there was any basis to Lindsey's allegations, he would have timely moved to set aside such Judgment.

3. Virgil Vial was informed through pending litigation between David Vial and Lindsey, that Lindsey had previously transferred all of his assets to a Business Trust called "Searchlight Trust." Thus, on November 22, 2002, pursuant to Idaho Code §8-501 et. seq. the Sheriff of Idaho County was delivered Notice of Garnishments, with all supporting documents, to be served upon the Searchlight Trust, as garnishee, c/o James Spickelmire as Trustee and c/o Boyd Hopkins as Trustee. *Id.*, ¶4.

4. On December 12, 2002, Julie Fowler requested an extension of time to January 2, 2003, for Searchlight Trust to answer the Interrogatories and Document Request contained in the Notice of Garnishment (the "Interrogatories"). *Id.*, Ex. 3. On December 30, 2002, the Searchlight Trust, again through Julie Fowler, requested a second extension of time, until January 20, 2003, to answer the Interrogatories. *Id.* Virgil Vial and David Vial have subsequently learned that Ms. Fowler is Lindsey's personal assistant/secretary of at least thirteen years. *Id.*, Ex. 2.D. Ms. Fowler essentially resides rent free on a home located on the same real property where the Debtors reside. *Id.*, Ex. 4.F., p. 7.

5. On January 16, 2003, a letter was sent from First Amendment Publishers in California ("First Amendment") stating that it was the administrator of Searchlight Trust and would respond to the Interrogatories shortly. *Id.*, Ex. 5. No answers were ever received from First Amendment. *Id.*, ¶7. On January 17, 2003, a letter was sent from Boyd Hopkins stating that he had resigned as Trustee from Searchlight Trust and "was not the record keeper" of the Trust and had "no knowledge of the information requested" in the Interrogatories. Schwager

Aff., Ex. 6. Thus, on January 22, 2003, a Motion for Excepting Answer of Garnishee and for Insufficiency and Failure to Answer Interrogatories was filed.

6. On March 13, 2003, Subpoena *Duces Tecums* were issued against Boyd Hopkins, James Spickelmire, and Julie Fowler for their depositions to be taken on March 21, 2003. On March 19, 2003, Brit D. Groom filed a Motion to Quash the Subpoenas *Duces Tecum* and affidavits of all three individuals stating they had no knowledge of the Searchlight Trust. Schwager Aff., ¶9. On March 20, 2003, Virgil Vial filed an Opposition to the Motion to Quash. In the Opposition, it was argued that Lindsey created an *inter vivos* living trust, called a Business Trust, entitled the Searchlight Trust on July 16, 1994. As set forth in the "Trust" document, at the time that the Trust was created, Lindsey granted and delivered to the Trust all of his real property and equipment inventory. Schwager Aff., Ex. 7.

7. Although Lindsey has argued and will likely continue to argue that his creditors cannot reach any of his assets because he transferred such assets in 1994 for the benefit of his children, the reality is that Lindsey has obviously controlled the Searchlight Trust within the last four (4) years and as a result, he cannot now pretend in this bankruptcy case that he has filed that he has minimal assets. To the contrary, the real property that he "claims" to have transferred to Searchlight Trust and currently resides upon has a tax assessed value in excess of a million dollars and contains personal property and furnishings of a substantial value. *Id.*, Ex. 8.

8. In a deposition taken of Lindsey in another matter, Lindsey claimed to have no interest in the real property upon which he was living free of charge, located in White Bird, Idaho, because he claimed that it was owned by Searchlight Trust. *Id.*, Ex. B.2. In that same deposition, he asserted to be an agent working for Searchlight Trust and, as a result, the Trust provided him a home to live in. *Id.* Lindsey further testified that the Trustees of the Trust were

Jim Spickelmire and Boyd Hopkins, and that when he needed to make a payment for something to do, then he went to them and requested that a payment be made. *Id.* When he was asked whether he had requested money from the co-trustees within the last six months, he stated, "I don't remember" and he also failed to remember what type of things for which he had requested payments. *Id.* He stated, "You would have to ask my bookkeeper [Julie Fowler], I really don't know." *Id.* In that litigation, Lindsey had also previously asserted under penalty of perjury that his only sources of income since January 1, 2000 was \$1,500 per month from Social Security, the ability to live in a home at White Bird, Idaho, and use of the furniture and vehicles owned by the Trust, free of charge. *Id.*, Ex. 2.A., p. 3.

9. Furthermore, on June 27, 2002, in the other litigation against Lindsey, Ms. Fowler testified that she had worked for Lindsey since 1990 and that she first worked for a corporation of Lindsey's called LT&L, "which then became River Mountain Ranch." *Id.*, Ex. 2.D. Interestingly, records from the Idaho Secretary of State's Office show that on January 30, 1997, Lindsey filed a Certificate of Assumed Business Name for the Searchlight Trust for the assumed name, "River Mountain Ranch." *Id.*, Ex. 9. Ms. Fowler went on to state that she later became an employee of River Mountain Ranch. *Id.*, Ex. 2.D. Ms. Fowler explained that Lindsey lives in a house owned by River Mountain Ranch (the dba of the Trust) and that there are six houses on that property. *Id.* She also testified that Lindsey receives \$1300 a month in benefits from River Mountain Ranch. *Id.*

10. Based upon the above, Virgil Vial argued in state Court that it was clearly evident that all three of the individuals named in the Subpoena *Duces Tecum* had direct information that was relevant to the assets of Lindsey and how Lindsey was using the Searchlight Trust to presumably avoid making payment to his creditors. Virgil Vial argued such individuals should

not be able to avoid providing such documents and information by merely resigning in their capacity as trustees and/or employees and attempting to throw the responsibility to an out of state entity called "First Amendment". It was argued that the deponents should certainly have information as to the documents that should exist as to the operation, control, assets and liabilities of the Searchlight Trust, documents showing authorization for payments made and the actual payments made for the benefit of Lindsey, and the affect of such payments on the assets of the Searchlight Trust. Furthermore, it was argued that it cannot be ignored that the Co-Trustees had attempted to transfer responsibilities under this "Trust" to an out of state entity. The state Court agreed with Plaintiffs. On or about March 27, 2003, the Court denied the Motion to Quash the Subpoenas. *Id.*, Ex. 11.

11. At the depositions taken in May 2003, none of the deponents, Boyd Hopkins ("Hopkins"), James Spickelmire ("Spickelmire"), or Julie Fowler ("Fowler") (collectively referred to herein as the "Deponents") produced any documents. *Id.*, Ex. 4.A, 4.B, 4.C. At Hopkins' deposition, he stated he did not remember reading the Subpoena *Decus Tecum*, but in any event, he claimed he had no documents related to the Searchlight Trust. *Id.*, Ex. 4.A. Despite being the Trustee of the Trust, Spickelmire testified that he has never had any documents related to the Trust. *Id.*, Ex. 4.B. Despite being the liaison between Lindsey and the Trustees, as well as the Bookkeeper for the Trust, and the person who still currently writes checks for the maintenance of the real property where Lindsey and Fowler reside, Fowler testified she had no documents and that she had sent them all to Mike Ioane in California, the new "administrator" for Searchlight Trust, now called River Mountain Properties, in California. *Id.*, Ex. 4.C. It appears by accessing the First Amendment website located at www.truthinlaw.org, that Mr. Ioane specializes in hiding money from creditors and refusing to pay taxes.

12. Nevertheless, despite the lack of production of documents, the depositions of the Deponents were very enlightening. For instance, despite the fact that the Searchlight Trust document states in part that the Trustees have complete power over the Searchlight Trust and the Certificate Holders (Lindsey) are not to have any power over the direction of the Searchlight Trust or any of its assets, the Trustee Hopkins testified that he was merely a figurehead, that he did not manage the assets of the Trust, and that he made no independent decisions whatsoever as Trustee. *Id.*, Exs. 4.D, 7. He merely followed the lead of Gerald Lindsey, Shannon Lindsey (Lindsey's son), or Julie Fowler. *Id.* Similarly, the Trustee Spickelmire also testified that he was merely a figurehead of the Trust and that it was very unimportant to him personally. *Id.*, Ex. 4.E. When he was asked whether he recalled how he came to act as Trustee of the Trust, he stated:

A. Yes. I've been a friend of Gerald's for most of both of our lives. And he said he needed a trustee and would I do it. And I said, well, what the Hell is a trustee?

Q. What did he tell you?

A. He said, I'm not sure, but we got to have one.

Id. p. 8. It was Spickelmire's understanding that the Trust was set up to protect the entire Lindsey family. *Id.* p. 16.

13. At Fowler's deposition, Fowler testified that prior to the "transfer" to Mike Ioane and First Amendment Publishers, she did take her directions regarding the Trust from Lindsey. *Id.*, Ex. 4.F., p. 25. She explained that the Trust was set up for his children to generate income for his children and that all of Lindsey's assets "went into Searchlight". *Id.* p. 58. She conceded that if one were to trace the assets, "Mountain Properties" now holds Lindsey's assets with Mike Ioane as the only principal of "Mountain Properties." *Id.* pp. 62-63. Fowler testified that "Mountain Properties" stepped into the Trust's role. *Id.* pp. 68-69. Yet, despite Fowler's

personal involvement in the Trust, which continues with "Mountain Properties," she testified that she has never seen any documents related to the formation of Mountain Properties, nor was she sure what type of business entity it was, although she assumed it was a trust. *Id.* pp. 86-88. Fowler further testified that she has continued to pay Lindsey's living expenses through "Mountain Properties," such as the insurance on the residence, the insurance on the vehicles, utilities and fuel. *Id.* pp. 68-70. The only difference is that she makes sure she does not keep any documentation and instead forwards all documentation to Mr. Ioane.

14. Fowler further testified that another trust was created to retain ownership of the vehicles used by Lindsey, and that this trust, called National Holdings, was created by Mr. Ioane, but she did not know who the beneficiaries of this trust were, nor the terms of this trust. *Id.* pp. 42-45. She did state that she was the Trustee and in that capacity paid for the insurance. *Id.* In addition, Fowler admitted that Mike Ioane through one of the entities paid Brit D. Groom to represent the Deponents. *Id.*, p. 74.

15. On June 9, 2003, a Judgment was entered in favor of David Vial and Bruce Comstock against Lindsey in the principal sum of \$137,961.25 (the "Vial/Comstock Judgment"). A copy of the Judgment is attached to David Vial's Proof of Claim filed on December 2, 2003 (the "Vial Proof of Claim"). The Judgment arose out of a collection action based upon an agreement signed by Lindsey in June 2000 in which Lindsey purchased 500 shares of Clara Bea, Inc. and all inventory of that company, which included over 105 items of substantial gold mining equipment, including a 1986 D7G Caterpillar Tractor valued at \$135,000, plus freight of \$42,000 at the time of sale. *Id.*, Ex. 12; Ex. 2.C. The Vial/Comstock Judgment was recorded in County of Idaho on June 26, 2003. *See* Vial Proof of Claim. The Agreement provided that Lindsey would issue (and did issue) a check in the sum of \$25,000 dated June 7, 2000 from the

Searchlight account and that the balance of \$100,000 would be paid by January 15, 2001. *Id.*, Ex. 12; Ex. 2.B. Lindsey caused two \$12,500 checks to be issued on the Searchlight Trust account. One in the name of David Vial and one in the name of Bruce Comstock. *Id.*, Ex. 12.

16. David Vial and Virgil Vial then joined efforts to collect their judgments against Lindsey.

17. Based upon the deposition testimony of the Deponents, a Debtor's Examination of Lindsey was noticed and he was subpoenaed to produce documents related to his assets and all trusts associated or created by Lindsey. On August 19, 2003, Brit D. Groom, on behalf of Lindsey, filed a Motion to Continue stating in part that Lindsey was in a remote part of Alaska and that it was going to take several weeks for Lindsey to "accumulate the extensive documents" requested. *Id.*, Ex. 13. In fact, Lindsey was served with the Order for the Debtor's Examination at the gold mine he was working on in Mud Creek, Alaska. *Id.*, Ex. 14. This Court granted a short extension to September 26, 2003, but held that failure to fully comply with the Court's order shall be grounds for contempt of court and sanctions. *Id.*, Ex. 15. Although some documents were produced by Lindsey on September 26, 2003, it was glaringly apparent that all essential documents were omitted. In fact, Lindsey included a letter in the document production from Mike Ioane of First Amendment Publishers to Lindsey which stated that First Amendment Publishers owned all of the requested documents and that "pursuant to the Contracts," Lindsey was not entitled to them. *Id.*, Ex. 16. Of course, no contract was produced.

18. After Virgil Vial and David Vial commenced collection of their judgments, the real property upon which the Debtors reside, which has a tax assessed value in excess of One Million Dollars (\$1,000,000) was transferred from Searchlight Trust to Mountain Property

- f. They do not own any machinery or equipment;
- g. They have not received any income from the operation of a business within the last two years;
- h. They have not received any income other than social security benefits in the last two years;
- i. They have not made any payments to insiders within the last year;
- j. They have not made any gifts over \$20 in the last year;
- k. Other than in the ordinary course of business, they have not transferred any property within the last year;
- l. They list "none" for any property owned by another person that the Debtors own or control;
- m. The Debtors list the following corporations that the Debtors were officers within the last six years: Candle Mining (June 2000-July 2001); Clara Bea, Inc., (June 2000-January 2001); Cornerstone Ranch; LT&L; Mud Creek Mining, Inc. (April 1997-January 2001) and Nevak Mining LLC (1997-1999).

26. Although Lindsey declares in his bankruptcy schedules that his duties as officer or manager of Mud Creek Mining, Inc. ended in January 2001, he filed a 2002 Annual Reclamation Statement in Alaska for gold mining in regard to the Annual Placer Mining Application as Gerald A. Lindsey/Mud Creek Mining, Corporation. *Id.*, Ex. 18. The Reclamation is a public document signed by Lindsey on December 31, 2002. The Alaska Department of Community and Economic Development lists Julie Fowler as the registered agent of Mud Creek Mining, Inc., at the same residential address listed by the Debtors in their bankruptcy schedules, and list the Debtor's address as the principal office address. *Id.*, Ex. 19.

27. Although Lindsey declares in his bankruptcy schedules that his duties as officer or manager of Nevak Mining, LLC ended in 1999, an Annual Placer Mining Application was filed with the State of Alaska in March 2003 and such application contains Lindsey's address for all the addresses listed in the application. *Id.*, Ex. 20. Nevak Mining, Ltd. is incorporated in the state of Nevada and now lists National Holding Trust as a member at the address of Mike Ioane. *Id.*, Ex. 21.

28. Although Lindsey declares in his bankruptcy schedules that his duties as officer or manager of Candle Mining Company, Inc. ended in July 2001, the Alaska Department of Community and Economic Development lists the Debtors' address as the principal office address and Julie Fowler as a director of such company. *Id.*, Ex. 20.

29. Glaringly omitted from the Bankruptcy Schedules is any of the gold mining equipment sold to Lindsey by David Vial and Bruce Comstock, or any interest in any company that used such equipment in Mud Creek, Alaska this spring.

30. It is obvious based upon the above, and other research uncovered by the Vials, that Lindsey has failed to fully disclose to this Court all of the Debtors' interests and assets.

OBJECTION TO CHAPTER 13 PLAN

Virgil Vial and David Vial object to the Chapter 13 Plan filed by the Debtors pursuant to 11 U.S.C. § 109(c). The Proof of Claims on file obviously establish that the Debtors do not meet the debt limitation requirements set forth § 109(e). Mr. Groom was well aware of this fact when the Chapter 13 was filed based upon his briefing in state court, of which he stated that the "the IRS and State Tax Commission have over 3 million dollars in tax liens against Mr. Lindsey personally". Schwager Aff., Ex. 17. It appears that Lindsey did not timely object to the Tax Liens and as a result such tax liens are liquidated and binding. The amounts due and owing

under the Vial Judgments alone total \$327,892.66. As stated above, there was no appeal or any other timely attempt to set aside either of the Vial Judgments. As a result, those Judgments are also liquidated and binding upon Lindsey.

Furthermore, the Chapter 13 Plan was not filed under good faith under 11 U.S.C. § 1325. To determine bad faith a bankruptcy judge must review the "totality of the circumstances". *Eisen v. Curry (In re Eisen)*, 14 F.3d 469 (9th Cir. 1994). A court should ask whether the debtor misrepresented facts in his petition or plan, unfairly manipulated the Bankruptcy Code, or otherwise filed his Chapter 13 Petition or Plan in an equitable manner. *Id.* Bad faith also exists where the Debtor only intended to defeat state court litigation. *Id.* As set forth above, the record in this case is clear that Lindsey filed this bankruptcy filing on the eve of an evidentiary hearing, in which the state court Judge had ordered Lindsey to appear and show cause why he should not be held in contempt for failing to produce all of the documents that related to the various trusts. It also clear based upon the record that Lindsey obviously is enjoying the benefits of all of his assets that he transferred to the Searchlight Trust, including the Million Dollar residence, that he has been in control of such assets, and it is only after collection proceedings were taken against him, that Lindsey caused Julie Fowler to transfer any and all relevant documents to Mike Ioane to "administer". It is also noteworthy that Lindsey was "involved" in gold mining operations with the gold mining equipment purchased from David Vial and Bruce Comstock within six months of filing the bankruptcy petition, yet there is no disclosure of this business. Nor was there any disclosure of National Holding Trust, which Ms. Folwer testified holds title to all of the vehicles used by Lindsey, and which apparently has a significant interest in mining operations being conducted in the state of Alaska, the very place where Lindsey was gold mining shortly before the bankruptcy filing.

JOINDER IN MOTION TO CONVERT

A Chapter 13 petition filed in bad faith may be converted “for cause” pursuant to 11 U.S.C. § 1307(c). *Id.*, *Molitor v. Eidson (In re Molitor)*, 76 F.3d 218 (8th Cir. 1996). “The purpose of the bankruptcy code is to afford the honest but unfortunate debtor a fresh start, not to shield those who abuse the bankruptcy process in order to avoid paying their debts”. *Id.* at 220; *Sladek v. Zeman (In re Sladek)*, 269 B.R. 229 (Colo. 2001). In deciding whether to convert or dismiss, the Court is to that which is in the best interests of the creditors and the estate. Collier on Bankruptcy, 15th ed. (¶1307.04).

It is apparent based upon the limited discovery that Virgil Vial and David Vial have been able to force Lindsey to produce that Lindsey has spent a significant amount of time and money causing various trusts and corporations to be created to attempt to avoid the attachment of any assets by creditors. As stated above, he has even gone as far as causing all of the documents that relate to his assets to be transferred out of state to Mike Ioane.

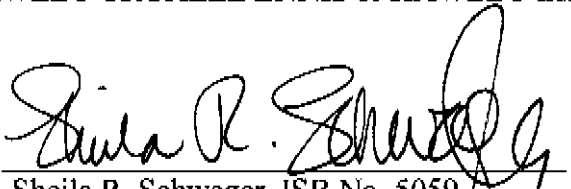
Thus, it is definitely in the best interests of creditors for this case to be converted to enable a Bankruptcy Trustee to marshall the assets of Lindsey and distribute such assets to Lindsey’s creditors. This is not the case of an honest, but unfortunate Debtor, needing a fresh start.

CONCLUSION

Wherefore, Virgil Vial and David Vial respectfully requests that confirmation of the Chapter 13 Plan be denied and that this Case be converted to a Chapter 7 liquidation.

DATED THIS 30th day of December, 2003.

HAWLEY TROXELL ENNIS & HAWLEY LLP

By 
Sheila R. Schwager, ISB No. 5059
Attorneys for Virgil Vial, Mark Vial, Mike
Vial, d/b/a Au Mining, and David Vial

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 30th day of December, 2003, I caused to be served a true copy of the foregoing OBJECTION TO CHAPTER 13 PLAN AND JOINDER OF TRUSTEE'S MOTION TO CONVERT CASE by the method indicated below, and addressed to each of the following:

Gerald and Ona Lindsey
HC01 Box 109B
White Bird, ID 83554

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ Telecopy

First Amendment Publishers
c/o Mike Ioane
801 Woodside Road, Suite 14-404
Redwood City, California 94061

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ Telecopy

United States Trustee
304 N. 8th, Room 347
Boise, ID 83702

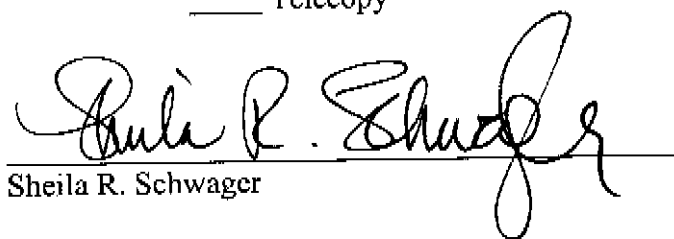
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☐ Overnight Mail
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☐ Overnight Mail
☒ Telecopy

C. Barry Zimmerman
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Coeur d'Alene, ID 83816-1240

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
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Sheila R. Schwager